But the merits of bill and keep certainly are not limited to cases in which a rough balance has been achieved between LEC-to-CMRS and CMRS-to-LEC traffic. The actual cost of terminating traffic is near zero, and LECs can recover any minimal costs from their own subscribers. Because the actual costs of interconnection are so low that the costs of measuring them approach the costs themselves, bill and keep is the economically efficient solution regardless of whether balance has been achieved in a particular LEC-CMRS relationship or even in LEC-CMRS traffic patterns generally. APC's experience in achieving a near-balance in traffic demonstrates that a nationwide bill-and-keep system would be fair because of the potential that all CMRS providers have for achieving traffic parity. The need for fair interconnection in developing competition is not limited to particular CMRS providers that, in fact, achieve balance. Rather, CMRS providers must be entitled to a fair system if competition is to emerge on a nationwide basis. Regardless of whether parity exists in a particular market, bill and keep is a sound and rational approach because it enables marketplace participants to focus on serving their customers rather than on engaging in inefficient measurement efforts to capture costs that are near zero.

ii. Bill and Keep Will Serve the Public Interest By Maximizing Consumer Welfare. The most direct and obvious benefit of bill and keep is the near-term effect this policy would have upon the telecommunications market in the United States. When CMRS providers can gain the foothold they will need to challenge the local-loop monopoly, consumers will benefit by the advent of competitive prices and innovative new services. The indirect benefits of eliminating above-cost interconnection charges, however, also will be substantial. Uneconomic interconnection charges have a broader, largely hidden impact that is felt throughout the market. These charges unjustifiably and unproductively increase costs to both the consumer and the business user, decreasing use and diverting traffic that otherwise might be carried by competitive CMRS providers.

This impact arises because telecommunications has a pervasive impact in our economy. American businesses continually increase their use of communications as telecommunications becomes a stronger substitute for capital investment -- for example, firms use telecommunications to obtain access to new and remote markets without investing in physical facilities.[33/] Advancements in telecommunications infrastructure have produced not only hundreds of billions of dollars saved by U.S. industry but an effective reduction in the consumer price index of 5 percent in a single year.[34/] This development has occurred largely in the absence of competition in the local exchange — economic savings have been realized by the development of long-distance competition and advancements in technology.

As telecommunications becomes a more vital component of the national economy, the impact upon consumer welfare of significant charges such as interconnection should not be underestimated. Interconnection charges have direct and indirect components — the "direct effect is the change in [consumers'] actual telephone bill from changes in service prices" and the "indirect effect is the impact on consumer prices induced by the changes in

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[33/] *See* F. Cronin, E. Colleran, M. Miller, R. Raczkowski, *The Impact of Alternative Local Interconnection Pricing on Stakeholder Groups In Canada*, pp. 12-13 (Canadian Radio-Television and Telecommunications Commission, January 1996) ("*Canada Interconnection Study*").

[34/] *See id.* at 13. The study found that in 1991 alone, U.S. businesses experienced a savings of $134 billion due to alterations in their production processes due to advances in telecommunications. Annual savings produced a "social rate of return" of 30 percent per year for almost three decades. *Id.*, *citing* F. Cronin, *et al.*, *Pennsylvania Infrastructure Study* (1991) (study funded by major LECs for submission to Pennsylvania Public Utility Commission).

business production costs."[35] A 1996 Canadian study found that the average household would realize some $82 in direct savings in telecommunications charges from competition under a bill-and-keep regime and nearly $165 indirectly from lower consumer prices for products that use telecommunications for a factor of production.[36] Because those less well-off spend a greater portion of their income on telephone services and consumer goods, the relative savings to these consumers from lower interconnection rates are great; "the expected reductions in telecommunications prices from more efficient interconnection pricing may have broad, positive and progressive effects across consumer groups."[37] This study demonstrates concretely that efficient interconnection policies can have a direct impact on the quality of life of all citizens whether or not they subscribe to CMRS services.

The Commission can produce this gain by adopting bill-and-keep interconnection in this docket without risk that this policy will harm existing wireline telephone subscribers. The adoption of bill and keep simply internalizes an economic benefit that wireline subscribers have enjoyed since the advent of wireless services — they have the significant benefit of being able to reach a wireless subscriber using another carrier's network and currently bear no cost whatsoever for doing so. A corollary value of bill and keep is that it would rationalize this uneconomic relationship. The minimal subscriber charges that may be imposed by LECs to take into account calls that are sent to wireless networks would be more than offset by the general price decreases that likely would result from an emerging competitive marketplace that would benefit *all* subscribers, whether wireless or wireline.

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[35] *Id.* at 31.

[36] *Id.* at 38.

[37] *Id.* at 39.

iii. Other Options Would Be Harmful. Each of the other options suggested by the *Notice* would fail to accomplish the Commission's central goals of establishing an interconnection system that is fair and promotes competition, is easy to implement and administer, and encourages the development of a "network of networks." Implementing bill and keep only for off-peak hours, for example, raises the same drawbacks of general cost measurement — the difficulties and expense of cost studies, the costs and burden of administration, and the very real potential for "gaming the system" by incumbent LECs — but for a smaller universe of CMRS-LEC traffic. It is essentially a system that shares the disadvantages of cost and complexity with other cost-based systems but lacks the benefits of an overall bill-and-keep system.

The *Notice* suggests analysis of existing LEC-LEC interconnection arrangements to determine whether alternative methods are utilized by LECs in those circumstances. As state commissions have noted, neighboring LECs often "have a 'bill and keep' arrangement, the rationale being that the traffic between the respective companies is roughly equal, so that mutual billing would net out to zero."[38/] LECs enter into bill-and-keep agreements regardless of balance.[39/] By contrast, existing LEC-cellular interconnection agreements are highly unbalanced agreements that should not be relied upon by the Commission for anything

[38/] City Signal, Inc., 159 P.U.R.4th 532, 1995 Mich. PSC LEXIS 32, *30 (Mich. Pub. Serv. Comm'n 1995).

[39/] *See* Issues Related to the Continued Provision of Universal Service, 1995 N.Y. PUC LEXIS 70, *19 (N.Y. Pub. Serv. Comm'n, March 8, 1995) ("[n]one of these agreements provide for charges to terminate local traffic; in essence, each carrier terminates the other's local traffic at no charge"). The Commission should not, however, rely upon agreements imposed on a small, independent LEC that is surrounded by a larger LEC or a regional Bell operating company; in those cases, the smaller LEC may have little more market power than a CMRS provider and may be subjected to a similarly inequitable arrangement.

more than evidence of the leverage that incumbent LECs historically have been able to exercise against CMRS providers.[40/] The same principle is true of the few agreements that exist between LECs and competitive access providers ("CAPs") and other new entrants. The mere fact that a CAP has reached an agreement with a LEC cannot be taken to mean that the CAP has obtained a fair bargain when that LEC's possession of bottleneck facilities essentially controls the CAP's ability to operate a business at all.[41/] There simply is no basis for concluding that current agreements that affect the LEC's current monopoly power are a proper basis for designing an interconnection scheme for potentially competitive CMRS providers.

iv. Bill and Keep Will Not Constitute a "Taking" of LECs' Property. The *Notice* is correct in concluding that the issue of appropriate billing mechanisms does not raise any constitutional "takings" issue. The issues at stake in this docket clearly raise no *per se* takings claim, as the Commission is not proposing to authorize a permanent physical invasion of anyone's property, *compare Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Bell Atlantic Telephone Companies* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994); nor will any of the proposed rules deprive anyone of "all economically beneficial or productive

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[40/] The effects of monopoly provider discrimination to prevent competition can be seen both empirically and historically. *See, e.g.*, G.W. Brock, *Interconnection and Mutual Compensation With Partial Competition* (CC Docket 95-54, 1995); Telocator Network of America's Cellular Interconnection Report and Request for Further Relief (Rep. No. CL-379, filed October 6, 1986).

[41/] Indeed, Congress, in the face of existing CAP-LEC agreements, expressed a clear preference for bill and keep. *See* 1996 Act, § 251.

use" of property, *Lucas* v. *South Carolina Coastal Comm'n*, 112 S.Ct. 2886, 2893 (1992).[42/]

Moreover, the LECs will not be able to make out any regulatory takings claim against the bill-and-keep principle because they remain free to recover *all* of the costs of terminating calls from their customers, who receive the benefit of the terminated calls. As the Washington commission has noted:

> It is thus simply wrong to suggest that the bill and keep procedure means that calls are being terminated "for free." The termination function is paid for, not by the originating company, but by the end-use customer in his flat monthly charge. That charge covers all access to and from the public switched network. Under bill and keep, a company is fully compensated for most call terminations by its own customer.[43/]

Thus, the bill-and-keep principle is not a taking of any property, but simply a regulatory measure that "adjust[s] the benefits and burdens of economic life to promote the common good." *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).[44/]

[42/] Because no party could make out a *per se* takings claim, the Takings Clause would not provide a basis to challenge the Commission's rules on a petition for review because there would not be "'an identifiable class or classes in which the application of the [rule] will necessarily constitute a taking.'" *See Bell Atlantic*, 24 F.3d at 1445 (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 128 n.5 (1985)).

[43/] Washington Utilities & Trans. Comm'n v. U S West Communications, Inc., 1995 Wash. UTC LEXIS 47, *76 (Washington Utilities & Trans. Comm'n, Oct. 31, 1995). The Washington Commission also noted that "confiscation in this context is measured not by any particular element of a rate structure, but by whether the end result of the entire process results in sufficient rates overall." *Id.*, *citing* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944).

[44/] As the California commission noted in rejecting a similar challenge to bill and keep:

> Thus, given the interim nature of the regulations, given the fact that 'bill-and-keep' will not interfere with 'investment-backed expectations' since it offers some compensation and allows for the local exchange market to open in January of 1996, and given the fact that the regulation will result at most in only

v. Length of Interim Period. Bill and keep clearly is the appropriate solution for an interim solution for CMRS interconnection. Whether it also is an appropriate permanent solution can only be determined when the Commission can gauge the industry's experience with a fair interconnection regime — an experience it has not had to date because no fair LEC-CMRS interconnection system has been in place. The Commission should observe the workings of the marketplace as PCS providers construct and operate systems with a bill-and-keep system before reexamining interconnection. This build-out period likely will be co-extensive with the time required for cellular carriers to convert to digital technology.

There is no need today to specify the length of the "interim" period, but the period should be sufficiently long to permit commercial PCS service to satisfy build-out requirements and to permit most CMRS providers to reach a degree of maturity in markets across the country. This period should, at a minimum, include the five-year period of the initial population-coverage requirement for PCS in the Commission's rules.[45] The early stages of roll-out are unlikely to be a sufficiently reliable and stable experience on which to base the long-term interconnection experience. Specific models such as those used in California and Connecticut are much too brief given the PCS build-out schedule.

> a 'minor diminution' of property value . . . necessarily leads to the conclusion that applicants claims of a 'taking' in this case are wholly lacking in merit.

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, 1995 Cal. PUC LEXIS 788, *28, 165 P.U.R.4th 127 (Cal. Public Utilities Comm'n, 1995).

[45] It is important that the interim period be tied to the five-year length of the build-out requirement rather than any particular licensee's achievement of that build-out benchmark. The time required for the CMRS market to mature will require at least that amount of time to assess, regardless of whether some PCS licensees cover greater amounts of population than necessary (perhaps for competitive reasons) to meet the minimum benchmark of the rule.

vi. The Bill-and-Keep Principle Should Be Extended To Transport. The *Notice* unwisely proposes to limit the bill-and-keep principle to end-office traffic rather than applying that principle consistently throughout the relationship between the CMRS provider and the LEC. This may be a useful distinction for non-facilities-based transactions but it has no place in the CMRS interconnection context. We urge the Commission to reject this arbitrary and unrealistic distinction as it applies to LEC-CMRS interconnection and to apply the bill-and-keep principle across the board.

The *Notice*'s limitation of bill and keep to end-office traffic would lead to an unfair and distorting effect on CMRS providers and their subscribers. Under the *Notice*'s proposal, for example, APC still would be required to pay substantial sums to Bell Atlantic to terminate APC's calls because of the costs imposed by Bell Atlantic for transport of APC's calls to Bell Atlantic's end office. Yet, APC would receive little or nothing to terminate calls from Bell Atlantic, despite the fact that APC incurs transport expenses as it carries the wireline-originated call to its equivalent of the end office. Since bill and keep means that each carrier bears its own costs, that principle is violated when CMRS providers are required to pay significant sums to a LEC for transport of traffic yet receive no transport compensation in return. The goal of economic efficiency would be undercut by limiting bill and keep in this manner. because the violation of the "recover-your-own-cost" principle in the area of transport would distort business decisions and cause inefficient construction and utilization of equipment and facilities. Moreover, the principle of each carrier recovering its own costs is rooted in the foundation of economic benefit: a person who benefits from a service should pay for that service. A LEC customer benefits from a CMRS-LEC and LEC-CMRS connection, and the benefit stems not just from the transmission element but from the switching and transport functions as well. Thus, it is only economically fair for a LEC subscriber and a CMRS subscriber each to bear a fair share of the costs of making such a connection.

We propose that costs of constructing and maintaining a dedicated interconnection facility be subject to the bill-and-keep principle that each carrier should recover its own costs. Both carriers and their customers benefit from the facility, and both carriers and their respective customers thus should bear the costs of constructing and maintaining that facility. Because the facility typically is constructed and operated by the LEC and the LEC determines the entry point into its system to which the traffic must be delivered, the Commission safely can assume that the facilities of the carriers meet half-way, or "mid-span."[46/] Thus, each party should pay 50 percent of the costs of necessary dedicated interconnection facilities. This division will permit both parties to share equally in the costs of facilities that benefit both parties equally.

* * *

CMRS providers need and deserve certainty. As PCS providers take the substantial risk of expending literally billions of dollars on constructing and launching their networks and clearing microwave users (in addition to the significant risks already taken in acquiring licenses), they must know that fair and reasonable interconnection agreements will be available. That certainty only will be possible if the Commission adopts an interim solution that ensures that interconnection will be available on fair and reasonable terms. When the market has matured, the Commission and the industry will have sufficient experience and data to craft a workable permanent solution. Until that time, however, the industry's

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[46/] This construct of assuming networks meet mid-span can be corrected, from an accounting basis, by the CMRS provider compensating the LEC for one-half the cost of the facility. The advantage of the mid-span construct is that it places the CMRS model on a consistent basis with arrangements that LECs enter with other co-carriers.

potential will be frustrated unless the Commission adopts its tentative conclusion to establish the bill-and-keep principle for interconnection.

b. Long-Term

When the Commission is able to assess the long-term relationships among LECs and CMRS providers when the latter industry has matured, it may find that private negotiations could take the place of a required bill-and-keep regime. Neighboring LECs of roughly equal size and market power, for example, may rely on the bill-and-keep principle as a matter of private negotiation because of a general equality in bargaining power. When the Commission revisits this issue after the CMRS industry has matured in both coverage and bargaining power, it may come to different conclusions about the need for continuing Commission oversight of interconnection arrangements. On the other hand, it may be that control over bottleneck facilities will constitute an enduring advantage for LECs. But that is a question that cannot be answered today when major CMRS networks across the country remain to be launched.

c. Symmetrical

A bill-and-keep regime will, in practice, result in a rough equivalence of the costs of interconnection being borne by LECs and CMRS providers. But the value of any system of interconnection is not merely its symmetry — as we demonstrate above, bill and keep is an appropriate interim decision because it is economically efficient, will increase consumer welfare and will satisfy the Commission's public interest goals. Attempting now, on an interim basis, to craft a highly regulatory and potentially resource-intensive plan in the name of achieving symmetrical rates would be premature, inequitable, speculative and unrealistic. It would likely miss the mark and injure consumers and competition.

B. IMPLEMENTATION OF COMPENSATION ARRANGEMENTS

The experience of the cellular industry in attempting to obtain even minimally acceptable interconnection arrangements in the mid-1980s demonstrates that the Commission must pay careful attention to implementation of its interconnection decision.[47/] When cellular was launched, the Commission was not sufficiently engaged in the implementation of the minimal and ill-defined principles that were to guide LEC-cellular interconnection; the predictable result was that cellular carriers were forced to agree to unjust and inefficient agreements when they finally won the right to interconnect at all.[48/] Some LECs even

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[47/] *See* Telocator Network of America's Cellular Interconnection Report and Request for Further Relief (Rep. No. CL-379, filed October 6, 1986). The cellular industry submitted hundreds of pages of abuses — ranging from flat-out denial of interconnection (which the Commission had explicitly barred) to gross discrimination between LEC-owned cellular operators and independent cellular operators (also expressly prohibited), to LEC-imposed limits on certain kinds of interconnection, to schemes that imposed excessive expenses on cellular carriers. After years of negotiation, complaints before state and federal authority and other activity, the most egregious of these abuses were phased out but the pattern of excessive charge remained. The Commission failed to police these instances because it had set up a vague standard of "reasonableness" that it had neither the will nor the resources to enforce on a case-by-case basis, and because cellular operators became resigned to serve an upper-echelon market and leave real competition with the LECs to upstart PCS providers.

[48/] This phenomenon is, unfortunately, a recurring theme in the history of telephone monopolies in the United States. It is instructive to recall that the initial assertion of federal jurisdiction over the Bell system in the Kingsbury Commitment of 1913 was prompted by Bell's refusal to permit independent telephone companies to interconnect with any of its facilities at all — a largely successful attempt to strong-arm independent telephone companies into selling their networks to the Bell system:

> The monopoly-bound bandwagon was rolling along. Independent telephone companies were falling into the Bell basket by the dozens. Moreover, public pressure for interconnection had begun to mount, and it was reflected in political pressure. Clearly, the people and their representatives had decided that [the Bell system] was becoming too large and powerful.

today claim that they are complying with the principle of "mutual compensation" even though, as discussed above, the costs of interconnection are imposed entirely upon the customers of the CMRS provider. The Commission must be vigilant against buzzwords like "mutual compensation" being utilized to dress up highly inefficient and inequitable arrangements as palatable solutions.

The most important step the Commission can take to prevent the recurrence of these enormous difficulties is to adopt bill and keep. The act of specifying a regulatory solution that is straightforward and essentially self-executing will prevent LECs from denying interconnection to CMRS carriers on terms that are fair and reasonable. The industry can bring any such abuses that do occur to the Commission's attention by filing complaints. The Commission should make explicit that it will (a) deal with any such complaints on an expedited basis.

D. Kline & D. Burstein, *Is Government Obsolete?*, WIRED, January 1996, at 86, 97-99, *quoting* J. Brooks, TELEPHONE: THE FIRST HUNDRED YEARS; *see generally* D. Brenner, LAW & REGULATION OF COMMON CARRIERS IN THE COMMUNICATIONS INDUSTRY (1992). It is not an exaggeration to say that if interconnection had been federally mandated in the 1920s, we would not be engaged some 70 years later in attempting to promote local telephone competition — it would have been a reality. By 1906, 57 percent of communities with more than 5,000 people had two or more local phone companies. "Had government intervened . . . by establishing interconnection obligations among competing carriers, we might have had local competition for the last 100 years." Testimony of Larry Irving, Ass't Sec. for Communications & Information, U.S. Dep't of Commerce, on Telecommunications Reform Legislation, Subcomm. on Telecommunications & Finance, Comm. on Energy & Commerce, U.S. House of Representatives, Jan. 27, 1994, at 13.

1. Negotiations and Tariffing

History and market conditions show that interconnection arrangements cannot be left entirely to private settlement with no role for the regulatory process. The *Notice* correctly concludes that LECs retain market power and have both the ability and the incentive to use that market power to impair the operations of potentially competitive CMRS providers. It is clear, then, that the Commission should have an appropriate oversight role, particularly during the interim period.

We do not, however, believe that it is necessary or appropriate for CMRS interconnection to be provided under a tariff. The tariff process would not take sufficient account of the unique needs of each CMRS provider and compliance with a tariff regime is too slow, inflexible and expensive to change. Such a requirement also would be contrary to the recent salutary trend at the Commission to move away from tariffing — when possible, the Commission has eased or dropped tariff requirements to reduce administrative burdens. Here, where many CMRS providers have stated that tariff procedures are unnecessary (*Notice*, ¶ 84), the Commission should be assured that it may avoid adopting these procedures without concern that protection of CMRS providers' interests would suffer.

Utilizing so-called "contract tariff" procedures also would be unnecessary. Such procedures solve only half the problems of tariffs: they increase the degree of flexibility the parties can apply to the issue, but they still involve substantial administrative costs for, we believe, little or no gain. Contract tariffs still subject parties to the potential delay of the regulatory process and enable the filing carrier to change the tariff at its discretion.

The preferred solution is to simply require interconnection agreements to be publicly available. This process would begin to equalize at least one element of the bargaining disparity among LECs and CMRS providers by ensuring that CMRS providers would have access to vital information on other agreements on a comparable basis to the LEC.[49] An additional benefit of enabling public inspection is that it would not increase the administrative burden on either LECs or CMRS providers or subject them to tariff-like procedures. These agreements could be either on file with the LEC or filed at the Commission. Of course, as discussed above, we believe strongly that a complaint procedure must continue to be available to deal with disputes expeditiously.

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[49] The Commission has long recognized that access to information can be an important element of bargaining. *See, e.g.*, Public Inspection of Affiliation Agreements, 15 R.R.2d 1579 (1969) (requiring network affiliation agreements to be filed at Commission "will enhance and intensify competition" and "equip licensees and the public with additional information relevant to the public interest"); *see also* Network Affiliation Agreements, 101 F.C.C.2d 516 (1985) (retaining filing requirement for television licensees); Filing of Television Network Affiliation Contracts, 10 F.C.C. Rcd. 5677 (1995) (assessing whether to retain rule).

2. Jurisdictional Issues

The Commission quite clearly has jurisdiction to preempt state regulation for both interstate and intrastate interconnection charges. The Commission should establish a national interconnection policy because (i) Congress intends the Commission to exercise plenary authority over CMRS rate and policy issues; (ii) interstate and intrastate elements of interconnection and wireless service generally are simply inseverable; and (iii) federal policies cannot be served unless the Commission preempts state authority. Nothing in the Telecommunications Act of 1996 alters this conclusion.

a. Legislative Intent. There is no question that the Commission has the authority to preempt state authority to establish an overarching federal policy on LEC-CMRS interconnection arrangements. This conclusion flows from a careful analysis of the amendments to the 1934 Communications Act by the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act")[50/] and the Telecommunications Act of 1996 (the "1996 Act"),[51/] as well as the inseverablility of the interstate and intrastate components of CMRS.

The Communications Act of 1934 (the "Act") contains a dual regulatory structure for interstate and intrastate wireline communications. Section 2(a) of the Act confers upon the Commission exclusive jurisdiction over "all interstate and foreign communication by wire or radio . . . ." [52/] Under this jurisdictional mandate, the Commission is empowered to regulate common carriers engaged in interstate communications. Section 2(b) limits the Commission's jurisdiction with respect to "charges, classifications, practices, services,

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[50/] Pub. L. No. 103-66 (August 10, 1993).

[51/] Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996).

[52/] *See* 47 U.S.C. § 152(a).

facilities, or regulations for or in connection with intrastate communications. . . ."[53] The Budget Act, however, fundamentally realigned the balance of federal/state jurisdiction over CMRS providers.

The Budget Act carved out an exception to the state authority outlined in Section 2(b) by amending the initial sentence of that section and adding Section 332(c)(3). After the 1993 amendment, Section 2(b) provides:

> Except as provided in sections 223 through 227, inclusive, *and section 332,* . . . nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to . . . regulations for or in connection with intrastate communication service . . . .(emphasis added.)

Section 332(c)(3), also added in 1993, states in relevant part:

> Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of *or the rates charged by any commercial mobile service* except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

Under these 1993 amendments, states no longer enjoy the authority to regulate the rates and entry of CMRS providers. Instead, under the Budget Act, state authority is limited to overseeing the "terms and conditions" of CMRS provided to end users. A close analysis of the 1993 amendments and their underlying legislative history reveals Congress intended to eliminate state substantive jurisdiction over wireless common carrier services.

The Budget Act sought to establish a national wireless communications policy. The legislative history of the 1993 amendments demonstrates Congress' intent to preempt state regulations in this area to create a uniform, national framework for regulation of CMRS. Congress acknowledged the inherent interstate nature of mobile services stating, "[mobile

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[53] 47 U.S.C. § 152(b).

services] by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[54] In order to accomplish its goal of a uniform regulatory scheme, Congress expressly amended Section 2(b) to eliminate the states' jurisdiction with respect to rate and entry regulation of CMRS providers. Thus, the initial clause introducing Section 2(b) and listing Section 332 provides exceptions to Section 2(b)'s mandate of state authority over intrastate communications. Section 332(c)(3)(A) preempted state authority with respect to the entry of or rates charged by commercial mobile services. Although Section 332(c)(3)(A) does not prohibit state regulation "of other terms and conditions of commercial mobile services," the statute's legislative history demonstrates this clause refers to such matters as customer billing information and practice, billing disputes and other consumer protection matters.[55] Consequently, the statute's allocation of state authority over "other terms and conditions" does not refer to interconnection between LECs and CMRS providers.

As a result, it is clear that under Section 332(c)(3)(A) the Commission has exclusive jurisdiction to regulate the interconnection fees charged by CMRS providers. In light of the Commission's exclusive jurisdiction over CMRS rates and the explicit denial of jurisdiction to states to regulate CMRS rates, it would be absurd to suggest that states have jurisdiction to regulate interconnection fees charged by LECs but the Commission lacks authority to regulate LEC and CMRS interconnection rates. To do so would be to ignore the inherent

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[54] H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993). In referring to the 1993 amendments, the Senate Budget Committee Report reveals Congress' intent to create regulatory parity. The Senate Report states "Section 409 [the Senate precursor to Section 332] is intended to ensure that providers of commercial mobile services are regulated in a similar, if not identical fashion." S. Rep. No. 36, 103rd Cong., 1st Sess. 73 (1993).

[55] H.R. Rep. No. 111, 103rd Cong., 1st Sess. 261 (1993).

interstate nature of commercial mobile services and Congress' intent to create a seamless, national network. Section 332 and its underlying legislative history reveal Congress' intent to "federalize" CMRS such that the notion of an intrastate or local portion of the service has no effect on the Commission's jurisdiction.[56] By preempting state authority over CMRS rates and entry, Section 332 reserves to the Commission jurisdiction to "occupy the field" of substantive CMRS regulation. To deny the Commission authority to regulate LEC interconnection rates, however, would mean the Commission could only occupy half the field. That clearly was not the intent of Congress.

The only rational interpretation of Section 332(c)(3) is that the Commission has jurisdiction over interconnection rates charged by both CMRS providers and LECs. This result comports with principles of statutory construction as well as with a rational allocation of regulatory responsibility. If the Commission did not have authority over LEC interconnection rates, and because states plainly lack authority over CMRS rates, then the same transaction would be regulated by two different entities — a situation that would lead to regulatory whip-saw. Each jurisdiction would only have authority over one half of a transaction. This result would not only frustrate Congress' intent to create a network of networks, it also would be administratively and economically inefficient. Thus, both elements of a LEC-CMRS interconnection rate structure must be regulated at the same level

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[56] The Commission similarly exercised exclusive jurisdiction over specialized mobile radio systems, finding that they are inherently interstate communications. In the *Land Mobile Services* docket, the Commission found that wireless SMRs operate "without regard to state boundaries or varying local jurisdictions" and on a "national basis." *See* Future Use of the Frequency Band 806-960 MHz and Amendment of Parts 2, 18, 21, 73, 74, 89, 91 and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806-960 MHz, Memorandum Opinion and Order, 51 F.C.C.2d 945, 972-3 (1975), *aff'd sub nom.* National Ass'n of Reg. Util. Comm'rs v. Federal Communications Comm'n, 525 F.2d 630, 646-47 (D.C. Cir. 1976).

and, as demonstrated above, that level can only be at the Commission. Another reason supporting this conclusion is the potential for individual states to impose their own LEC rate regulations, thus frustrating Congress' goal of creating a uniform, national wireless communication policy.[57]

The 1993 Budget Act sought to establish a uniform, federal regulatory framework for all mobile services. Accordingly, Congress' modification of Section 2(b) and addition of Section 332 transferred jurisdiction for regulating LEC-CMRS interconnection rates from the states to the Commission. The 1996 Act does not alter this conclusion. In fact, the 1996 Act affirmatively confirms that Section 332(c) of the Communications Act of 1934, as amended by the Budget Act, controls the federal-state regulation of CMRS service.[58]

Despite the plain language of the 1996 Act explicitly preserving Section 332, Bell Atlantic and Pacific Telesis now argue that the 1996 Act wipes out the sweeping state preemption of section 332 and forbids the federal government *or* states from imposing bill

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[57] The Supreme Court has held that "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." Louisiana Public Serv. Comm'n. v. Federal Communications Comm'n, 476 U.S. 355 (1986). Congress granted the Commission plenary authority over CMRS rate regulation largely because CMRS providers depend on federal spectrum and licenses for their service. Thus, the overall framework of the 1993 Budget Act confirms Congress' intent to vest jurisdiction over CMRS with the Commission and to allow the Commission to "occupy the field" with respect to all rates related to CMRS providers. For example, Section 332(c)(3)(A) authorizes the Commission to approve or reject state petitions to grandfather existing CMRS rate regulation or apply for new CMRS rate regulation. Section 332(c)(1)(C) directs the Commission to conduct "annual reports" reviewing competitive market conditions with respect to CMRS. This section requires the Commission to consider whether forbearance or enforcement of a provision "will promote competitive market conditions" for CMRS providers. Indeed, it is impossible to name an area of intrastate communication in which the Commission has broader authority.

[58] *See* 1996 Act, Section 253(e) ("Nothing in this section shall affect the application of Section 332(c)(3) to commercial mobile service providers. . . .").

and keep.[59] That argument, however, too readily eviscerates Section 332 and ignores the plain congressional intent to preempt state regulation of CMRS activity.

Congress adopted section 332 to prohibit states from regulating the "rates charged by any commercial mobile service." 47 U.S.C. §332(c)(3)(A)(i). Bell Atlantic/Pac Tel argue for a crabbed reading of "rates" to refer to only charges to consumers; the logic of section 332, however, defies such an interpretation. The goal of Congress in adopting section 332(c) was to deny states jurisdiction over the pricing activity of CMRS providers because of the decidedly federal nature of wireless service.[60] That pricing activity necessarily includes rates that CMRS providers charge customers and rates CMRS providers charge LECs for interconnection. Put simply, Congress intended to end the practice of CMRS providers having to go to state regulators for rate approval. Yet to permit states to exercise authority over CMRS interconnection rates would force CMRS providers to go right back to the states for rate approvals — precisely the result Congress wished to avoid.[61]

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[59] *See* Letter from Michael K. Kellogg, Counsel for Bell Atlantic and Pacific Telesis, to William F. Caton, FCC, February 26, 1996 (CC Docket 95-185) ("Ex Parte Letter").

[60] H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993).

[61] Bell Atlantic and PacTel point to the FCC's recent decision on a Louisiana state preemption petition to support their claim that states still have authority over CMRS interconnection rates. *See* Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana, 10 F.C.C. Rcd. 7898, 7908 (1995). However, the decision to which they cite stands contrary to the 1993 Budget Act and a rational allocation of regulatory responsibility and should be reversed. The Commission erred in *Louisiana PSC* because it ruled that states can regulate LEC charges to CMRS providers for interconnection. The Commission correctly suggested that states have no authority to assert jurisdiction over charges by CMRS providers, but the Commission failed to recognize the implication of its decision that states can regulate LEC-CMRS interconnection charges. As discussed above, permitting states to regulate LEC interconnection rates and leaving CMRS rates subject to federal regulation will frustrate the intent of Congress to "federalize" the provision of wireless service. The FCC has authority,

Bell Atlantic/PacTel letter also claim that *no* regulator can mandate bill and keep arrangements. They reach this conclusion by arguing that Section 251(b)(5) dictates "reciprocal compensation" and that, under Section 252(d)(2)(A) "reciprocal compensation" is required to

> provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier.

But Congress made clear in Section 252(d)(2)(B)(i) that the definition of "reciprocal compensation" allows for arrangements based on "the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." Bill and keep *is* one form of "reciprocal compensation" because it provides for "the offsetting of reciprocal obligations": The CMRS provider is obligated to transport and terminate calls that originate on the LEC's network, and the LEC is obligated to do likewise for calls that originate on the CMRS network.[62]

Bell Atlantic/PacTel note that Section 252 includes as one example of "the offsetting of reciprocal obligations" a *voluntary* bill-and-keep arrangement and, on this basis, they argue

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under the power granted to it in the 1993 Budget Act and codified in Sections 332(c) and 201, to assert jurisdiction over CMRS *and* LEC interconnection rates. This grant of authority was preserved by the 1996 Telecommunications Act. *See* Section 251(i). In order to achieve the goal of a "networks of networks," the Commission must exercise that authority to the fullest extent, or else the result will be a wireless infrastructure that is not seamless, but rather Balkanized.

[62] The Ex Parte Letter seems to assume that "the offsetting of reciprocal obligations" occurs only "when both parties terminate roughly equal amounts of traffic." Ex Parte Letter at 6. This is a puzzling assumption because there is no such requirement in the statute. Section 252(d)(2)(B)(i)'s standard is satisfied if reciprocal *obligations* are offset, not if reciprocal amounts of traffic are offset. The offsetting of obligations required under bill and keep is entirely reciprocal because both a CMRS provider and an LEC are reciprocally obligated to terminate the other's traffic.

that bill and keep may *only* be done on a voluntary basis. The statute, however, does not say that. The statute generally allows for arrangements based on "the offsetting of reciprocal obligations." Voluntary bill and keep is one example of such a system, but mandatory bill and keep is too: The crucial question under the statute is whether the system is based on the offsetting of reciprocal obligations. Bill and keep is such a system because the obligation of the LEC to terminate calls originating on a CMRS network is offset by the reciprocal obligation of the CMRS provider to terminate calls originating on the LEC network.

While Section 252(d)(2) clearly allows bill and keep as one permissible "reciprocal compensation arrangement," it equally clear that the status quo between LECs and CMRS providers is *not* consistent with the standards in Section 252(d)(2). Where there is no system based on the offsetting of reciprocal obligations, Section 252(d)(2) requires "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Section 252(d)(2)(A)(i). But under the current status quo, LECs do not pay CMRS providers for the costs associated with transporting and terminating calls that originate on the LEC network. Instead, the CMRS providers — and in turn CMRS subscribers — shoulder these costs. Indeed, because CMRS subscribers must pay the costs of terminating calls to them, they are hesitant to give out their phone numbers, which tends to decrease the amount of traffic running from the LEC to the CMRS network below what it otherwise could be.

Thus, if Sections 251 and 252 were applicable to LEC-CMRS interconnection (and, as detailed above, we believe they are not because of section 332(c)), the "reciprocal compensation" standard in section 251(b)(5) and 252(d)(2) would require either (1) a system based on "the offsetting of reciprocal obligations" (such as bill and keep), or (2) a true system of mutual compensation, which would require LECs (not CMRS subscribers) to shoulder the costs of terminating calls that originate on LEC facilities.[63]

Nothing in the 1996 Act alters the conclusion that states lack authority to regulate CMRS interconnection rates. Therefore, the FCC is uniquely qualified and authorized to regulate CMRS-LEC interconnection rates and should do so.

b. Interstate and Intrastate Traffic Are Inseverable. The inseverability of interstate and intrastate CMRS traffic provides an additional ground in support of the Commission's jurisdiction over LEC-CMRS interconnection rates pursuant to the amendments to Section 332 adopted in 1993. The technological framework of wireless networks makes it impossible to separate out the origin of a single call to determine whether such a call is interstate or intrastate. Wireless calls, and wireless service areas such as major trading areas and basic trading areas, simply do not respect state lines. This inseverability requires Commission jurisdiction in the area of LEC-CMRS interconnection rate regulation.

In *Louisiana Public Service Commission* v. *Federal Communications Comm'n*, 476 U.S. 355 (1986), the Supreme Court created an exception to Section 2(b)'s prohibition on Commission authority with respect to intrastate communications. *Louisiana*, and subsequent case law, establish that Commission preemption of a state regulation is consistent with Section 2(b) where the state rule would thwart or impede the exercise of lawful federal authority over interstate communications, such as when it is not possible to separate the

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[63] It is somewhat ironic for Bell Atlantic, in particular, to argue that "reciprocal" or "mutual" only permits an equal balance of payments. Bell Atlantic's interconnection agreement with APC, which is wildly one-sided in favor of Bell Atlantic, is contained in a document entitled "Bell Atlantic Mutual Compensation Plan." *See* APC Separate Comments at 5. Thus, Bell Atlantic recognizes that "mutual" or "reciprocal" is not the same as "equal."

interstate and intrastate portions of the asserted FCC regulations.[64] Thus, Commission preemption of a state regulation is proper where (1) a state regulation negates the exercise by the FCC of its own lawful authority over interstate communications and (2) it is not possible to separate the interstate and the intrastate components of the asserted regulation.

Both the Commission and the courts have utilized the "inseverability" or "impossibility" exception to restrict state regulatory authority. For example, the Ninth Circuit relied on the "impossibility" exception in its recent decision to uphold the Commission's preemption of California's Caller ID blocking policy. *California* v. *Federal Communications Comm'n*, 1996 U.S. App. LEXIS 1234 (Jan. 31, 1996). In that case, the court held preemption was proper because California's policy negated the FCC's regulatory goals of promoting the development of new consumer services and choices. *Id.* at 9. The Commission explained it had determined as a matter of federal policy that a called party should have access to incoming calling party numbers ("CPN") unless the calling party had exercised his right not to have his CPN revealed. According to the court, California's per line blocking default rule would thwart and impede the federal goal for interstate CPN-based services.[65] The court also concluded the Commission had demonstrated its preemption of California's default regulation fit within the "impossibility" exception because it was

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[64] *Id.* at 375, n.4; *see also* National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc., 77 R.R.2d 1110 (1993).

[65] The California Public Utilities Commission regulation at issue dealt with preventing the disclosure of callers' phone numbers through Caller ID services. Under the California regulation, emergency service organizations and subscribers with nonpublished numbers who fail to communicate their choice between per call blocking and a system that blocks disclosure on all calls, known as per-line blocking, would be served with the system that blocks disclosure on all calls by default.

technologically impossible to separate intrastate and interstate calls to provide different regulations for call blocking.[66]

Similarly, in *Public Utility Comm'n of Texas* v. *Federal Communications Comm'n*, 886 F.2d 1325 (D.C. Cir. 1989), the court found the Commission properly preempted an order of the Public Utility Commission of Texas which precluded a corporation from interconnecting its private network facilities with the public switched telephone network in Dallas. The court held preemption was proper because the Texas order thwarted the federal policy of ensuring that licensees of private microwave networks can interconnect those facilities with the public interstate network at locations of their choice.

The Commission also relied on the inseverability exception to preempt a Georgia Public Service Commission decision to prohibit BellSouth from providing voice mail service to new customers in Georgia, even though the Georgia commission had found that BellSouth engaged in anti-competitive conduct toward the independent voice mail industry.[67] The Commission concluded that BellSouth's voice mail service was jurisdictionally "mixed," receiving calls from out-of-state as well as in-state, even though rational assumptions could

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[66] The Commission took a similar position in *Petition for an Expedited Declaratory Ruling Filed by National Association for Information Services*, 71 R.R.2d 1110 (1993). There, the Commission preempted a South Carolina regulation which required LECs to automatically block access to 900 services unless a subscriber affirmatively requested access. The Commission held such automatic default blocking would thwart and impede the federal policy for access to interstate 900 Services as provided in the Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556 (1992). The Commission also held it was not possible for carriers to implement automatic default blocking for intrastate 900 calls while complying with the federal policy that they may not implement that blocking for interstate 900 calls. Thus, the Commission found the doctrine of inseverability applied because implementation of the South Carolina blocking requirements for intrastate calls would also necessarily apply to interstate 900 calls.

[67] *See* Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 70 R.R.2d 584 (1992).